1998

The State of Utah v. Wilhelimina Lotte : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	*	
Plaintiff/Appellee	*	
vs.	*	Case No. 981469-CA
WILHELIMINA LOTTE,	*	Priority 2
Defendant/appellant.		

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY IN THE SECOND DISTRICT COURT FOR DAVIS COUNTY, BEFORE THE HONORABLE JON M. MEMMOTT.

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of conviction in the Second Judicial District Court of Davis County, Utah, before the Honorable Jon M. Memmott, enterd on the 2nd day of June, 1998.

The Court of Appeals has jurisdiction over this appeal by virtue of Rule 3(a) of the Utah Rules of Appellate Procedure.

This court has jurisdiction pursuant to Utah Code Annotated 78-2a-2 (2) (f) (1953 as amended).

STATEMENT OF ISSUES ON APPEAL

1. May an officer insert his head inside a vehicle he has stopped for a traffic stop without probable cause or reasonable suspicion?

2. Even if an officer may intrude his body into a vehicle subsequent to a traffic stop but prior to the establishment of probable cause or reasonable suspicion, may a burnt tablespoon form the evidence sufficient to permit the officer to further detain and request the driver to allow further search of vehicle?

3. Should an officer be compelled to obtain a search warrant if he observes what may be drug paraphenelia in an automobile stopped for a traffic violation?

STANDARD OF REVIEW

The standard of review for suppression issues is that findings of fact will not be disturbed unless clearly erroneous. State v. Steward. 806 P.2d 215 (Utah App 1991).

The standard of review for conclusions of law is a correction of error standard. State v. Steward. supra.

TABLE OF CASES and STATUTES, ORDINANCES and CONSTITUTIONAL PROVISIONS WHICH ARE DETERMINATIVE

1. State v. Anderson, 910 P.2d 1229 (Ut. Ct App)

2. State v. Beavers, 859 P.2d 9 (Ut. Ct App 1993)

3. State v. Case, 884 P.2d 1274 (Ut. Ct App 1994)

4. State v. Hygh, 711 P.2d 272 (Utah 1984)

5. State v. Larocco, 794 P.2d 460 (Utah 1990)

6. State v. Patefield, 927 P.2d 655 (Ut. Ct App 1996)

7. State v. Schlosser, 774 P.1d 1132 (Utah 1989)

8. State v. Sims, 808 P.2d 141 (Utah 1991)

9. State v. Strickling, 884 P.2d 979 (Utah App 1992)

10. U.S. v. Angular-Fernandez, 1995 WL 257255 (10th Cir)

11. U.S. v. Nielsen, 9 F.3d 1487 (10th Cir 1993)

12. U.S. v. Walker, No. 90-CR-13 (Utah 1990)

13. United Sates Constitution, Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers. and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

11. Article I, section 14 of the Constitution of the State of Utah states:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but

upon probable cause supported by oath or affirm action, particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF FACTS

On February 27, 1997, the defendant's automoble was stopped for speeding in Davis County with a visual estimate of speed by the Utah Highway Patrol. (TR.4) The officer approached the defendant while she was seated as driver in the vehicle and asked for defendant's registration and as the defendant reached for that the officer stuck his head into the vehicle and looked in. (Tr 5 at lines 18 to 21 and Tr. 14 lines 11 to 16, and Tr 15 at lines 2 to 6).

The officer saw a burned spoon in the drivers side door compartment and based upon that he asked to search the automobile of the defendant (Tr. 15 lines 19 to 20). He obtained her verbal consent, conducted a search and found in the purse of defendant he found white powder residue that turned out to be controlled substance (Tr 7 lines 17 to 23 and Tr 8 lines 1 to 3).

STATEMENT OF CASE

The defendant was charged in the possession of methaphetmine a third degree felony and possession of paraphenlia on February 27, 1997, in Davis County, State of Utah.

The defendant moved to suppress the evidence found during a search of her car and an evidentiary hearing was held on April 15, 1998, before the Honorable Jon Memmott in Farmington, Utah. The Motion to Suppress was denied on the 15th day of April, 1998. On June 2, 1998, the defendant entered a conditional plea to possession of a controlled substance, a third degree felony and the defendant appealled to this Court on June 23, 1998.

SUMMARY OF ARGUMENTS

1. MAY AN OFFICER INSERT HIS HEAD INSIDE A VEHICLE HE HAS STOPPED FOR A TRAFFIC STOP WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION?

The defendant maintains that in a traffic stop the arresting officer may not insert his head into the stopped vehicle without reasonable suspicion or other valid reason and that such an insertion is a search.

2. EVEN IF AN OFFICER MAY INTRUDE HIS BODY INTO A VEHICLE SUBSEQUENT TO A TRAFFIC STOP BUT PRIOR TO THE ESTABLISHMENT OF PROBABLE CAUSE OR REASONABLE SUSPICION, MAY A BURNT TABLESPOON FORM THE EVIDENCE SUFFICIENT TO PERMIT THE OFFICER TO FURTHER DETAIN AND REQUEST THE DRIVER TO ALLOW FURTHER SEARCH OF VEHICLE?

The defendant maintains that the sight of a burned spoon does not rise to the level or reasonable suspicion that a felony has been committed.

3. SHOULD AN OFFICER BE COMPELLED TO OBTAIN A SEARCH WARRANT IF HE OBSERVES WHAT MAY BE DRUG PARAPHENELIA IN AN AUTOMOBILE STOPPED FOR A TRAFFIC VIOLATION?

That there is no finding from the record and nothing in the record to find exigent circumstances to allow a search and seizure without a warrant nor is there anything to suggest that a warrant could not be obtained.

ARGUMENT

1. MAY AN OFFICER INSERT HIS HEAD INSIDE A VEHICLE HE HAS STOPPED FOR A TRAFFIC STOP WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION?

In the case at bar the police officer, shortly after the stop of the defendant's automobile, "stuck" his head inside the automobile of the defendant's automobile and looked inside. (Tr 15 lines 2 to 6). He did this without consent or justification. He saw a burnt spoon by looking down to the door compartment (Tr 15 line 4) and then asked to search the vehicle which was granted by the defendant. The officer testified he asked for consent because of the spoon he saw (Tr 15 line 19 to 20).

The defendant contends that there is no testimony in the record which would indicate that a burned spoon is in any manner indicative of any unlawful activity or even that the officer concluded that a burnt spoon is indicative of crime activity. Thusly, there are no articulable acts to connect the defendant with the possession of drugs. State v. Case, 884 P.2d 1274, (Utah Ct App

1994), and State v. Steward, 806 P.2d 213, 216 (Utah App 1991).

The argument is that the State must establish some testimony that a burnt spoon means something and that something rises to articulable suspicion. No such testimony is extant at all.

However, even if there were testimony linking the burnt spoon to criminal activity and thusly serve as articulable suspicion, there was no right for the officer to have inserted his head into the interior of the defendant's automobile.

There was no objection probable cause to allow the officer to invade the automobiles interior and look around. There needs to be a common sense assessment the circumstances. State v. Brown, 798 P.2d 284, 285 (Utah App 1990). There were no facts at all for the officer's intrusion and thusly the search must fail even if this became a level two stop pursuant to State v. Smoot, 921 P.2d 1003 (Ut. App 1996) because such a search requires some reasonable suspicion even if there is a temporary detention in order to write a speeding ticket.

2. EVEN IF AN OFFICER MAY INTRUDE HIS BODY INTO A VEHICLE SUBSEQUENT TO A TRAFFIC STOP BUT PRIOR TO THE ESTABLISHMENT OF PROBABLE CAUSE OR REASONABLE SUSPICION MAY A BURNT TABLESPOON FORM THE EVIDENCE SUFFICENT TO PERMIT THE OFFICER TO FURTHER DETAIN AND REQUEST THE DRIVER TO ALLOW FURTHER SEARCH OF THE VEHICLE?

The defendant argues that if there is no evidence at all of the signficance of a burnt spoon, then the State may never be

said to have met the burden of showing articulable suspicion or probable cause.

State v. Steward, 806 P.d 213, 216, (Ut. App 1991) is to the effect that mere driving in proximity to drug searches in nearby houses is not enough facts to show a suspicion of criminal activity.

In State v. Patefield. 927 P.2d 655 (Ct. App 1996) the court failed to find probable cause in a level two situation where the officer observed a 12-pack of beer because the possession of beer is lawful.

These cases are valid precedent for the idea that even if the Court has properly before it the spoon in question because the officer's insertion of his head is ruled valid, there must be some connection of that to criminal activity. Nothing exists in the record or by common sense and the request to search the vehicle based upon such a spoon is not permissable because there is no articulable suspicion of anything.

3. SHOULD AN OFFICER BE COMPELLED TO OBTAIN A SEARCH WARRANT IF HE OBSERVES WHAT MAY BE DRUG PARAPHENELIA IN AN AUTOMOBILE STOPPED FOR A TRAFFIC VIOLATION?

Assuming arguendo that the officer in the case at bar had the right to intrude his head into the vehicle of the defendant while he was asking her for her registration and assuming that a spoon which has a burn spot on it is indicative of drug paraphenlia

giving the officer reasonable suspicion to further detain the defendant, should the officer have obtained a warrant?

Nothing in the record indicates that there was any problem in obtaining a warrant. The level-two stop had escalated into something more because the officer had seen what he thought was something that gave him reasonable suspicion to continue or escalate the seizures as in State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994) and State v. Patefield, 927 P.2d 655 (Ut App 1996).

The officer unlawfully extended the traffic stop to conduct a search contrary to State v. Figuero - Solorio 830 P.2d 276, 280 (Utah App 1992) and State v. Robison, 797 P.2d 431 (Ut. App 1990) but also, the issue would have been resolved had he obtained a warrant.

State v. Larrocco, 794 P.2d 460:

> As Justice Zimmerman explained in Hygh, supra:
>
> Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease in which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, 7-23-4(2) (1982 ed.)

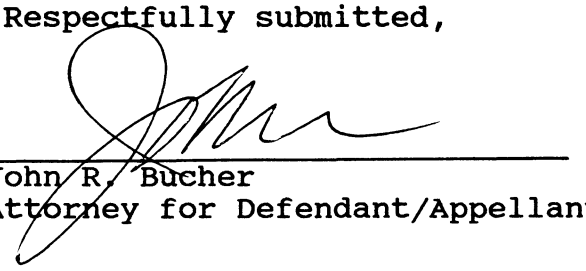
State v. Hygh, 711 P.2d at 272; see State v. Lopez, 676 P.2d 393 (Utah 1984).

CONCLUSION

The defendant/appellant argues that the officer did not have the right to intrude his body into her vehicle and look around while the encounter was still a level-two stop to give a speeding ticket, and even if he had such a right nothing in the record or by common sense indicates that the spoon is indicative of any unlawful activity or was unlawful in itself and even if it were reasonable suspicion of criminal activity, nothing in the record indicates that the officer could not have obtained a warrant and for those reasons the trial court erred and the Motion to Suppress should have been granted.

DATED this 1st day of February, 1999

Respectfully submitted,



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DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was delivered to the following on the 1st day of February, 1999.

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